Great United Store Ltd v Al Bimar bin Isting (t/a Bimar Trading) & Anor

HIGH COURT (SEREMBAN) — CIVIL SUIT NO NA-22NCvC-14–03 OF 2022
WAN FADHILAH NOR JC
20 FEBRUARY 2024

Contract — Misrepresentation — Negligent misrepresentation — Plaintiff entered contract with first defendant for supply of refined palm oil and sunflower oil — Plaintiff communicated with first defendant through a third party individual — First defendant failed to deliver goods in agreed manner — Plaintiff sued second defendant for negligent misrepresentation — Whether second defendant was the third party individual — Whether second defendant had duty of care to be true and careful when making representations — Whether there was special relationship — Whether second defendant

Contract — Restitution — Unjust enrichment — Plaintiff entered contract with first defendant for supply of refined palm oil and sunflower oil — Plaintiff made payment to first defendant — First defendant failed to deliver goods in agreed manner — First defendant transferred monies to bank account of second defendant's company — Whether monies in bank account of second defendant's company were plaintiff's monies — Whether second defendant had been unjustly enriched

The plaintiff filed an action against the first defendant for breach of contract due to the first defendant's failure to deliver refined palm oil and refined sunflower oil ('the said goods') to the plaintiff in the manner as had been agreed despite the fact that the plaintiff had made full payment in the sum of USD253,000 for the said goods. As the first defendant failed to enter his appearance, judgment in default of appearance was entered against him. It ought to be noted that throughout the negotiation of the contract between the parties, PW1 of the plaintiff mostly communicated with the second defendant who had introduced himself as Mr Rayan Zikri. Upon investigations and via discovery applications, the plaintiff discovered that the phone number +6011–32510118 used in the said communications ('the said phone number') was registered under the name of the second defendant. Premised on this fact, the plaintiff had also filed the present action against the second defendant for negligent misrepresentation and restitution for unjust enrichment. The plaintiff argued that any loss and damages suffered by them due to the breach of contract was also due to the conducts of the second defendant. It was the plaintiff's case that Mr Rayan Zikri was the person who made negligent

misrepresentation to the plaintiff in order to mislead the plaintiff into buying the said goods from the first defendant. In relation to unjust enrichment, the plaintiff argued that the monies that were transferred from the first defendant's account to the business account of a company known as Cotruzione Machine Automatic Varie Resources ('Cotruzione') (the second defendant's company) for no apparent reasons were the plaintiff's monies and as such, the second defendant had been unjustly enriched. In defence, the second defendant argued that the transfer of the said monies was made on the instruction of a business partner of the first defendant named Maradona and the monies received from the first defendant were Maradona's monies. The issues to be tried in the present case were: (a) whether the second defendant was Rayan Zikri and thus liable for negligent misrepresentation; and (b) whether the second defendant had been unjustly enriched by the fact that a sum of RM539,303 had been deposited into his company's account from the first defendant's account.

Held, allowing the plaintiff's claim against the second defendant with costs of RM25,000 to be paid by the second defendant to the plaintiff:

(1) Negligent misrepresentation was any representation which was made expressly or impliedly without reasonable grounds for believing it to be true. It was an established principle that for a misrepresentation to be a negligent misrepresentation, there must be a special relationship between the representor and the representee. In such a case, the representor owed a duty to be careful in giving his representations to the representee. The plaintiff and the first defendant in the present case had entered into an agreement for the purchase of the said goods, as such, there existed a special relationship between them. Further, from the facts, it was clear that Mr Rayan Zikri had portrayed himself to be the representative of the first defendant and the plaintiff had no reasons to believe otherwise. Considering that there was a special relationship between the plaintiff and the first defendant, there was therefore a duty on Mr Rayan Zikri as a representative of the first defendant to be careful and to believe that any information he gave to the plaintiff was true information (see paras 41–42 & 49–51).

(2) Via the discovery procedure, it was revealed that for the registration of the said phone number, a copy of the second defendant's identity card and the second defendant's mobile phone number, 017–6241134 were given to Maxis. Under the circumstances, it could be deduced that the person who had subscribed to the said phone number was the second defendant. Thus, the court opined that there was sufficient evidence which indicated that the registered owner of the said phone number was indeed the second defendant and that the person whom PW1 was communicating with using the said phone number was the second defendant who had gone under the fictitious pseudonym of Mr Rayan Zikri. If it was a case

of stolen identity, the least the second defendant could do was to lodge a proper report of such a case to the police and to Maxis but none of the reports that he had made to Maxis was strictly on identity theft (see paras 55–60).

(3) The second defendant never had the intention to be true or careful when he made the representations regarding the sale and the delivery of the said goods. This was evident from the fact that he was hiding behind a different name and using a fictitious identity. The principle of law was clear that there was a duty on the second defendant to be true and careful when making the representations. As the facts unfolded, the oils that were delivered to the plaintiff were not of the same quantity or quality as had been represented. Thus, based on the above-mentioned facts, the court found that the second defendant was in breach of his duty of care and was liable of making negligent misrepresentation to the plaintiff (see paras 62–64).

(4) It was a trite law that a party who pleaded a fact must prove it (s 103 of the Evidence Act 1950). However, in the present case, the second defendant had failed to discharge the said burden of proof. There was no evidence whatsoever of the existence of Maradona. Further, the second defendant had also failed to bring any evidence to support his allegation that the money which was deposited into his company's account was in fact Maradona's money. The court found that this Maradona character was just a figment of the second defendant's imagination and that the second defendant had failed to bring any valid justification which explained the reason behind the transfer of the monies from the first defendant's account into his company's account (see paras 74–75 & 81–83).

(5) The plaintiff had produced evidence to show that the second defendant was Mr Rayan Zikri, the marketing and sales manager of the first defendant. As a representative of the first defendant, it was reasonable to believe that the second defendant had an access into the first defendant's bank account. The evidence had shown that monies were transferred from the first defendant's account into the business account of the second defendant's company, Contruzione. In the absence of any legitimate explanation for the said transfer, the court found that the monies paid into Contruzione's account were the plaintiff's monies (see para 84).

(6) By definition, unjust enrichment was premised on the maxim that no one should benefit at the expense of another. In other words, a person should not be enriched in an unjust manner. Based on the facts, the court opined that the plaintiff had managed to show that the second defendant had no basis whatsoever to retain the monies in the Contruzione's account. The plaintiff had succeeded in proving that despite having received full payment for the purchase of the said goods, the defendants failed to deliver the goods to the plaintiff. Thus, there was no basis for the second

defendant to keep or retain the plaintiff's money. By keeping the money for their benefit, the second defendant was unjustly enriched at the plaintiff's expense, and this had given rise to the right by the plaintiff to claim for restitution against the second defendant (see paras 65 & 88–90).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu tindakan terhadap defendan pertama kerana melanggar kontrak di atas kegagalan defendan pertama menghantar minyak sawit bertapis dan minyak bunga matahari bertapis ('barangan tersebut') kepada plaintif mengikut cara yang telah dipersetujui walaupun plaintif telah membuat bayaran penuh sebanyak USD253,000 untuk barangan tersebut. Oleh kerana defendan pertama gagal memasukkan kehadirannya, penghakiman ingkar kehadiran telah dibuat terhadapnya. Perlu diingat bahawa sepanjang rundingan kontrak antara pihak-pihak, PW1 daripada plaintif pada kebanyakan masa berkomunikasi dengan defendan kedua yang telah memperkenalkan dirinya sebagai Encik Rayan Zikri. Selepas siasatan dan melalui permohonan-permohonan penzahiran, plaintif mendapati bahawa nombor telefon +6011–32510118 yang digunakan dalam komunikasi tersebut ('nombor telefon tersebut') telah didaftarkan di bawah nama defendan kedua. Berdasarkan fakta ini, plaintif juga telah memfailkan tindakan semasa terhadap defendan kedua kerana salah nyata cuai dan restitusi untuk pengkayaan tak patut. Plaintif berhujah bahawa apa-apa kehilangan dan kerugian yang dialami oleh mereka akibat kemungkiran kontrak tersebut juga adalah disebabkan oleh kelakuan defendan kedua. Ia adalah kes plaintif bahawa Encik Rayan Zikri adalah orang yang membuat salah nyata secara cuai kepada plaintif untuk mengelirukan plaintif supaya membeli barangan tersebut daripada defendan pertama. Berhubung dengan pengkayaan tak patut, plaintif berhujah bahawa wang yang dipindahkan daripada akaun defendan pertama ke akaun perniagaan syarikat yang dikenali sebagai Cotruzione Machine Automatic Varie Resources ('Cotruzione') (syarikat defendan kedua) tanpa sebab yang jelas adalah wang plaintif dan oleh itu, defendan kedua telah diperkaya secara tak patut. Dalam pembelaan, defendan kedua berhujah bahawa pemindahan wang tersebut dibuat atas arahan rakan niaga defendan pertama bernama Maradona dan wang yang diterima daripada defendan pertama adalah wang Maradona. Isu-isu yang perlu dibicarakan dalam kes ini ialah: (a) sama ada defendan kedua ialah Rayan Zikri dan dengan itu bertanggungjawab untuk salah nyata cuai; dan (b) sama ada defendan kedua telah diperkaya secara tak patut oleh fakta bahawa sejumlah RM539,303 telah didepositkan ke dalam akaun syarikatnya daripada akaun defendan pertama.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan kedua dengan kos RM25,000 dibayar oleh defendan kedua kepada plaintif:

(1) Salah nyata cuai ialah apa-apa representasi yang dibuat secara nyata atau tersirat tanpa alasan yang munasabah untuk mempercayainya sebagai benar. Prinsip yang telah ditetapkan adalah bahawa untuk salah nyata menjadi salah nyata cuai, perlu ada hubungan istimewa antara pemberi representasi dan penerima representasi. Dalam kes sedemikian, pemberi representasi bertanggungjawab untuk berhati-hati dalam memberikan representasinya kepada penerima representasi. Plaintif dan defendan pertama dalam kes ini telah menandatangani perjanjian untuk pembelian barangan tersebut, oleh itu, wujud hubungan istimewa antara mereka. Selanjutnya, daripada fakta, jelas bahawa Encik Rayan Zikri telah merepresentasikan dirinya sebagai wakil defendan pertama dan plaintif tidak mempunyai sebab untuk mempercayai sebaliknya. Memandangkan terdapat hubungan istimewa antara plaintif dan defendan pertama, maka terdapat kewajipan ke atas Encik Rayan Zikri sebagai wakil defendan pertama untuk berhati-hati dan mempercayai bahawa apa-apa maklumat yang dia berikan kepada plaintif adalah maklumat yang benar (lihat perenggan 41–42 & 49–51).

(2) Melalui prosedur penzahiran, didapati untuk pendaftaran nombor telefon tersebut, salinan kad pengenalan defendan kedua dan nombor telefon bimbit defendan kedua, 017–6241134 telah diberikan kepada Maxis. Di bawah keadaan tersebut, boleh disimpulkan bahawa orang yang telah melanggan nombor telefon tersebut adalah defendan kedua. Oleh itu, mahkamah berpendapat bahawa terdapat keterangan yang mencukupi yang menunjukkan bahawa pemilik berdaftar nombor telefon tersebut sememangnya defendan kedua dan orang yang berkomunikasi dengan PW1 menggunakan nombor telefon tersebut adalah defendan kedua yang telah menyamar sebagai Encik Rayan Zikri. Jika ia adalah kes identiti yang dicuri, sekurang-kurangnya apa yang boleh dilakukan oleh defendan kedua adalah dengan membuat laporan yang sewajarnya mengenai kes sedemikian kepada polis dan kepada Maxis tetapi tiada satu pun laporan yang dia buat kepada Maxis adalah mengenai kecurian identiti (lihat perenggan 55–60).

(3) Defendan kedua tidak pernah mempunyai niat untuk menjadi benar atau berhati-hati apabila dia membuat representasi mengenai penjualan dan penghantaran barangan tersebut. Ini terbukti daripada fakta bahawa dia berselindung di sebalik nama yang berbeza dan menggunakan identiti rekaan. Prinsip undang-undang adalah jelas bahawa terdapat kewajipan ke atas defendan kedua untuk bersikap benar dan berhati-hati semasa membuat representasi. Apabila fakta terbongkar, minyak yang dihantar kepada plaintif bukanlah kuantiti atau kualiti yang sama seperti yang telah direpresentasikan. Oleh itu, berdasarkan fakta yang disebutkan di atas, mahkamah mendapati defendan kedua telah melanggar kewajipan berjaga-jaganya dan bertanggungjawab membuat salah nyata cuai kepada plaintif (lihat perenggan 62–64).

(4) Adalah menjadi undang-undang yang mantap bahawa pihak yang memplid fakta mesti membuktikannya (s 103 Akta Keterangan 1950). Bagaimanapun, dalam kes ini, defendan kedua telah gagal melepaskan beban pembuktian tersebut. Tiada apa-apa keterangan langsung tentang kewujudan Maradona. Selanjutnya, defendan kedua juga gagal membawa apa-apa keterangan untuk menyokong dakwaannya bahawa wang yang dimasukkan ke dalam akaun syarikatnya sebenarnya adalah wang Maradona. Mahkamah mendapati watak Maradona ini hanyalah rekaan khayalan defendan kedua dan defendan kedua gagal membawa apa-apa justifikasi yang sah yang menjelaskan sebab di sebalik pemindahan wang daripada akaun defendan pertama ke dalam akaun syarikatnya (lihat perenggan 74–75 & 81–83).

(5) Plaintif telah mengemukakan keterangan untuk menunjukkan bahawa defendan kedua ialah Encik Rayan Zikri, pengurus pemasaran dan jualan defendan pertama. Sebagai wakil defendan pertama, adalah munasabah untuk mempercayai bahawa defendan kedua mempunyai akses ke dalam akaun bank defendan pertama. Keterangan telah menunjukkan bahawa wang telah dipindahkan daripada akaun defendan pertama ke dalam akaun perniagaan syarikat defendan kedua, Contruzione. Sekiranya tiada apa-apa penjelasan yang sah untuk pemindahan tersebut, mahkamah mendapati bahawa wang yang dibayar ke dalam akaun Contruzione adalah wang plaintif (lihat perenggan 84).

(6) Secara takrifan, pengkayaan tak patut adalah berdasarkan maksim bahawa tiada siapa yang patut mendapat manfaat dengan mengorbankan orang lain. Dengan kata lain, seseorang itu tidak seharusnya diperkaya dengan cara yang tak patut. Berdasarkan fakta, mahkamah berpendapat bahawa plaintif telah berjaya menunjukkan bahawa defendan kedua tidak mempunyai apa-apa asas untuk mengekalkan wang dalam akaun Contruzione. Plaintif telah berjaya membuktikan bahawa walaupun telah menerima bayaran penuh untuk pembelian barangan tersebut, defendan-defendan gagal menyerahkan barangan tersebut kepada plaintif. Oleh itu, tiada asas untuk defendan kedua menyimpan atau mengekalkan wang plaintif. Dengan menyimpan wang tersebut untuk manfaatnya, defendan kedua telah diperkaya secara tak patut atas perbelanjaan plaintif, dan ini telah mewujudkan hak plaintif untuk menuntut restitutsi terhadap defendan kedua (lihat perenggan 65 & 88–90).]

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (folld)
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Lmited [1943] AC 32, HL (refd)
Hedley Byrne &Co v Heller and Partners Ltd [1964] AC 465, HL (refd)
Interfinance Bhd v UMW (Sarawak) Sdn Bhd [1994] 1 AMR 183, HC (refd)

Pendaftar Dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v KS South Motor Sdn Bhd [2000] 2 MLJ 540, CA (refd)
Yam Kong Seng & Anor v Yee Weng Kai [2014] 4 MLJ 478, FC (refd)

Legislation referred to

Evidence Act 1950 s 103

(Bharathi & Assoc) for the petitioner
(Soo Thien Ming & Nashrah) for the respondent.

Wan Fadhilah Nor JC:

INTRODUCTION

[1] This is the plaintiff's action against the first defendant for breach of contract due to the first defendant's failure to deliver refined palm oil and refined sunflower oil to the plaintiff in the manner as had been agreed despite the fact that the plaintiff had made full payment in the sum of USD253,000 for the said goods.

[2] Despite having been properly served with the writ of summons, the first defendant did not enter his appearance. Hence, on 25 May 2022, a judgment in default of appearance was entered against the first defendant for the above sum.

[3] Thus, as far as the case is concerned, the trial only proceeded against the second defendant where the plaintiff alleged that any loss and damage suffered by them due to the breach of contract was also due to the conducts of the second defendant.

[4] The plaintiffs claim against the second defendant is for:

(a) negligent misrepresentation; and

(b) restitution for unjust enrichment.

[5] The plaintiff had called three witnesses:

(a) Vanessa Murerwa Mugabe, the Legal and Operation Director of the plaintiff (PW1);

(b) Francis Mugabe, the Managing Director of the plaintiff (PW2); and

(c) Ali Makongoro, the Managing Director of the Advanced Freight International Ltd, the plaintiffs clearing agent (PW3).

[6] The defendant had called two witnesses:

(a) Muhammad Sultan Faizul Arafat bin Noorul Arifin, the second defendant, a businessman and a sole proprietor of Contruzione Machine Automatic Varie Resources (DW1); and

(b) Mohd Abid bin Che Abdullah, a police officer and a friend of the second defendant (DW2).

DECISION OF THE COURT

[7] Having heard and perused the testimony of the witnesses and the exhibits produced and having read the submissions and the authorities from the lawyers for both parties, it is the decision of the court that the plaintiff has, on the balance of probabilities succeeded in proving its case against the second defendant, and as such the plaintiff's claim in encl 1, para 34 (1, 2 and 3) is allowed with costs of RM25,000 to be paid by the second defendant to the plaintiff.

THE PLAINTIF'S CASE

[8] The plaintiff's claim against the second defendant is for negligent misrepresentation and for restitution for unjust enrichment.

Negligent misrepresentation

[9] The plaintiff is a company in Kampala, Uganda and it is an importer and exporter of commodities such as cooking oil and salt. The plaintiff came across the business of the first defendant via an online platform where the first defendant was representing himself as the prominent manufacturer, exporter, and supplier of refined palm oil and refined sunflower oil.

[10] In February 2021, PW1 of the plaintiff got in touch with the first defendant through mobile numbers of +6011–28617842 and emails under the email address of asfarayan94@gmail.com which the plaintiff had obtained from the website http://asfaraent.com.

[11] Throughout the negotiation, which was carried out online, PW1 testified that she mostly communicated with the second defendant who introduced himself as Mr Rayan Zikri, the Marketing and Sales Manager of the first defendant with a view of purchasing from the first defendant 20 containers of refined palm oil and refined sunflower oil ('the said goods'). The mobile phone number used by Mr Rayan Zikri is +601132510118.

[12] It is part of the agreement that the said goods were to be delivered by the first defendant to Bujumbra, Burundi via Dar es Saalam, Tanzania. The plaintiff then proceeded to purchase the said goods from the first defendant.

[13] On or about 9 February 2021, the first defendant and Mr Rayan Zikri issued to the plaintiff Proforma Invoice dated 9 February 2021 for the sum of USD253,000 in respect of the said goods. The Proforma Invoice bears the rubber stamps of one 'Mr Rayan Zikri, Marketing and Sales Manager, Bimar Trading, Negeri Sembilan Malaysia' and that of the first defendant.

[14] On 9 February 2021, the plaintiff paid the advance payment and transmitted 50% of the purchase price in the sum of USD126,500 into the first defendant's Maybank Account No 505104027258.

[15] On the same day, the plaintiff sent an email to the first defendant and Mr Rayan Zikri to inform them about the payment of the 50% deposit of the purchase price.

[16] In reply, Mr Rayan Zikri wrote, via an email assuring that:

(a) the first defendant will ship five containers of palm oil of 20 litres and five containers of sunflower oil of five litres as per the request of the plaintiff;

(b) the first shipment will arrive Dar es Salaam, Tanzania in 30 days; and.

(c) the second shipment will be shipped ten days after the first shipment.

[17] On or about 10 February 2021, the first defendant and the plaintiff entered into an exclusive distribution agreement whereby the first defendant appointed the plaintiff as the first defendant's exclusive agent and distributor in marketing of their products for a period of five years. The agreement was signed by both parties.

[18] The agreement was prepared and forwarded by Mr Rayan Zikri to the plaintiff. After having signed the agreement, PW1 had emailed the agreement back to Mr Rayan Zikri.

[19] On 6 March 2021, the plaintiff paid the balance 50% purchase price of USD126,500 to the first defendant's Maybank Account No 505104027258.

[20] The plaintiff did not receive the said goods or any part thereof within the period stated in the proforma invoice which is 30 days from the purported dates of shipment.

[21] With the help of the police networks, the plaintiff managed to locate the first defendant who agreed to send the plaintiff all the oils as promised.

[22] However, despite the said promise, only 14 out of 20 containers of oil had arrived at Dare es Salam. Not only that, it was later found that they were

not the goods ordered and purchased by the plaintiff. Some of the containers contained water instead of refined palm oil or sunflower oil. This has been confirmed by the Tanzanian Authorities dated 1 November 2021 (exh 83/CBD/B/315–321) and 8 November 2022 (exh 83/CBD/B/432).

[23] The plaintiff commenced this action against 'Al Bimar bin Isting trading as Bimar Trading' as the first defendant and an unknown person as the second defendant as at that time, the plaintiff did not know the actual identity of Mr Rayan Zikri.

[24] After obtaining discovery orders against Maybank in respect of bank account No 505104027258 and against Maxis Broadband Sdn Bhd in respect of the registered owner of mobile phone number +601132510118, it was found that the registered owner of the mobile number was the second defendant.

[25] Based on the said information, the plaintiff has the reason to believe that Mr Rayan Zikri is the second defendant, the person who made negligent misrepresentation to the plaintiff in order to mislead the plaintiff into buying the said goods from the first defendant.

Unjust enrichment

[26] It is an agreed fact that the second defendant is the sole proprietor of a company named Cotruzione Machine Automatic Varie Resources (Cotruzione) and the company had received money from Al Bimar, the first defendant.

[27] In fact, the second defendant had admitted in his defence that there were several sums of monies deposited into the business bank account of Cotruzione from the bank account of the first defendant. The statement of account of Cotruzione had shown that the company had received series of payments from the first defendant in the months of February, March and April of 2021 in the sum of RM539,303.

[28] It is the plaintiff's contention that the monies which was deposited into Cotruzione's business account from the first defendant's Maybank account was actually the plaintiff's monies.

[29] The plaintiff had paid full price for the goods but did not receive the said goods. Instead, substantial sum of the monies totalling RM539,303 was transferred by the first defendant to the second defendant's account for no apparent reasons.

[30] Thus, based on the aforesaid reasons, the plaintiff claims that the second defendant had been unjustly enriched.

THE DEFENDANT'S CASE

Negligent misrepresentation

[31] The second defendant denies that he is Rayan Zikri. According to the second defendant, the reason his name was registered as owner of the mobile phone number +6011–32510418 used by Rayan Zikri in communication with the plaintiff is because his identity has been stolen.

[32] In short, the second defendant claims that he was a victim of an identity theft and as a result of that, his details were used by an unknown person to subscribe to the mobile number +6011–32510418. In fact, he had made various report to alert Maxis on this issue.

[33] It is the position of the second defendant that there is no clear evidence which shows that Rayan Zikri is the second defendant. Therefore, the plaintiff's allegation that the second defendant is Mr Rayan Zikri and the person responsible in making negligent misrepresentation to the plaintiff is a bare allegation and one that was made without any basis.

Unjust enrichment

[34] The plaintiff claims that the second defendant received a substantial sum of the purchase money of USD253,000 paid by the plaintiff to the first defendant for the said goods.

[35] During the trial, PW1 testified that the sums totalling RM539,303 were transferred from the bank account of the first defendant to the account of the second defendant's company, Cotruzione for no obvious reason.

[36] Second defendant had insisted that the monies which his company had received from the first defendant was not his. He stood by his version that the monies were deposited into his company's business account from the first defendant's Maybank account on the instructions of his friend, Maradona.

[37] In 2018, through a business connection, the second defendant knew a foreign man from Cameroon who was known as Maradona. To the second defendant's knowledge, Maradona was involved in car spare parts business.

[38] As a foreigner, Maradona had found it difficult to open his own bank account in Malaysia and had asked for the second defendant's help to use the

second defendant's business account to run his business. Maradona claimed that Al Bimar (the first plaintiff) is his business partner. Al Bimar would transfer his payments to Maradona into the second defendant's business account, and the second defendant, on Maradona's instruction would transfer the money to some third parties.

[39] Since March 2021, the second defendant had lost contact with Maradona and since then, he no longer received any request by Maradona to use his bank account for the purpose of receiving or transferring money.

[40] It is the contention of the second defendant that the monies paid by the first defendant into his company's business account was not his monies but was Maradona's monies.

ISSUES TO BE TRIED

(a) whether second defendant is Rayan Zikri and thus, liable for negligent misrepresentation; and

(b) whether the second defendant had been unjustly enriched by the fact that a sum of RM539,303 had been deposited into his company's account from the first defendant's account.

THE GROUNDS FOR THE DECISION

Whether the second defendant is Rayan Zikri and liable for the negligent misrepresentation

[41] By definition, negligent misrepresentation is any representation which is made expressly or impliedly without reasonable grounds for believing it to be true (*Interfinance Bhd v UMW (Sarawak) Sdn Bhd* [1994] 1 AMR 183, HC, *Pendaftar Dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v KS South Motor Sdn Bhd* [2000] 2 MLJ 540 (CA).)

[42] It is an established principle that a misrepresentation could be regarded as negligent only if the representor owed a duty to be careful to the representee ie there must exist a special relationship between the representor and the representee (*Hedley Byrne &Co v Heller and Partners Ltd* [1964] AC 465).

[43] In this case, it is the argument of the second defendant that there is no relationship between the second defendant and the plaintiff. It was the first defendant who had entered into an agreement with the plaintiff and any payments from the plaintiff for the sale of the goods were paid into the first defendant's account. Throughout the negotiations for the purchase of the oils,

the plaintiff was either dealing with the first defendant or Mr Rayan Zikri. The second defendant was not involved in any of the transactions.

[44] However, the plaintiff is claiming that Mr Rayan Zikri is the second defendant and the person responsible for making the alleged negligent misrepresentations to the plaintiff regarding the sale of the oils.

[45] Before concluding as to whether there is special relationship between the plaintiff and the second defendant, the court is to determine whether Mr Rayan Zikri is the second defendant as claimed by the plaintiff.

[46] To decide on this, the court looks into the evidence of PW1. According to PW1, throughout the negotiation for the purchase of the oils, she was dealing with an individual who had introduced himself as Rayan Zikri, Marketing and Sales Manager of Bimar Trading, Negeri Sembilan, Malaysia, the first defendant.

[47] It was Mr Rayan Zikri who had emailed her the proforma invoice dated 9 February 2021 for the sale of the goods for the price of USD253,000, and the person she dealt with for the signing of the exclusive distribution agreement entered into between the plaintiff and the first defendant. It was Mr Rayan Zikri again, by his email to PW1 dated 9 February 2021 assuring her that the first shipment of the oil will be delivered to the plaintiff via Dare es Salam, Tanzania in 30 days from the date of shipment.

[48] When there was a delay in the delivery of the oils as promised, it was Mr Rayan Zikri that she had managed to communicate with. Mr Rayan Zikri had contacted her via phone number +6011–32510118 and had assured her of the redelivery of the oils.

[49] It is an established principle that for a misrepresentation to be a negligent misrepresentation, there must be a special relationship between the representor and the representee. In such a case, the representor owes a duty to be careful in giving his representations to the representee (*Hedley Byrne &Co v Heller and Partners Ltd* [1964] AC 465 (HL)). Since both plaintiff and the first defendant had entered into an agreement for the purchase of the oils, the court is of the opinion that there exists a special relationship between the plaintiff and the first defendant.

[50] From the facts above, it is clear that Mr Rayan Zikri had portrayed himself to be the representative of the first defendant and the plaintiff had no reasons to believe otherwise. As the marketing and sales manager of the first defendant, any reasonable person would think that Mr Rayan Zikri was representing the first defendant for the sale of the goods.

[51] Having established that there is a special relationship between the plaintiff and the first defendant, there is a duty on Mr Rayan Zikri as a representative of the first defendant to be careful and to believe that any information he gave to the plaintiff is true information.

Whether the second defendant is Rayan Zikri

[52] Upon investigations by the plaintiff and through two discovery applications made in the court by the plaintiff against Maxis and Maybank, the plaintiff discovered that the phone number +6011–32510118 used in the communications between the PW1 and Mr Rayan Zikri was registered under the name of the second defendant.

[53] In his counter argument, the second defendant claimed he was a victim of an identity theft. In other words, his identity had been stolen. It is the reason the mobile phone number +6011–32510118 is registered under his name. However, the court finds that his statement is a bare statement as he failed to substantiate his claim with any documentary evidence.

[54] All the police reports that the second defendant have tendered in court are in respect of unrelated matters, and none is about the identity theft as he had claimed, and hence, the court finds that the reports are irrelevant.

[55] Furthermore, despite vigorously denying that +6011–32510118 is his number, the second defendant admitted that 017–6241134 is his personal number Through the discovery procedure, it was also revealed that for the registration of mobile phone number +6011–32510118, a copy of the second defendant's identity card and the second defendants mobile phone number, 017–6241134 were given to Maxis.

[56] Under the circumstances, it can be deduced that the person who had subscribed to the mobile phone number is the second defendant. Thus, the court is of the opinion that there is sufficient evidence before the court which indicate that the registered owner of mobile phone number, +6011–32510118 is indeed, the second defendant.

[57] It is also the finding of this court that the person whom the PW1 was communicating with using that mobile phone number was the second defendant who had gone under the assumed name of Mr Rayan Zikri.

[58] The court also finds that the second defendant has failed to come up with any reasonable and plausible explanation to justify the fact that his registered mobile phone number was used by Rayan Zikri in his communications with the plaintiff.

[59] If it is a case of stolen identity as he has claimed, and as a result of that, his name was wrongly registered for the number that is not his, the least he could do is to make a proper report of such a case to the police and to Maxis. However, as mentioned above, none of the reports that he made to Maxis was strictly on identity theft. There were on unrelated and irrelevant matters.

[60] Thus, based on the above reasons, it is the finding of this court that the second defendant had gone under the fictitious pseudonym of Mr Rayan Zikri. The facts have shown that under the name of Mr Rayan Zikri, the second defendant, allegedly acting on behalf of the first defendant had made several representations regarding the sale and delivery of the refined palm oil and sunflower oil to the plaintiff. The facts have also shown that he failed to comply with the represented terms.

[61] As mentioned above, the representor owes a duty to be careful in giving his representations to the representee (*Hedley Byrne &Co v Heller and Partners Ltd* [1964] AC 465).

[62] It is the finding of the court that the second defendant had been far from careful when making the representations regarding the sale and the delivery of the oils to the plaintiff. The court also found that the second defendant never had the intention to be true or careful when he made the said representations. This is evident from the fact that he was hiding behind a different name and using a fictitious identity. This is clearly a sign of dishonesty and an indication that he is not willing to be identified or accountable for any non-compliance on the part of the first defendant in the sale of the oils.

[63] The principal of law is clear that there is a duty on the second defendant to be true and careful when making the representations. As the facts have unfolded, the oils that were delivered to the plaintiff were not in the same quantity or quality as had been represented.

[64] Thus, based on the above-mentioned facts, it is the finding of the court that the second defendant is in breach if his duty of care and is liable of making negligent misrepresentation to the plaintiff.

Whether the second defendant had been unjustly enriched by the fact that a sum of RM539,303 had been deposited into his company's account from the first defendant's account

[65] By definition, unjust enrichment is premised on the maxim that no one should benefit at the expense of another. In other words, a person should not be enriched in an unjust manner.

[66] The principle of unjust enrichment has been laid down in the House of Lords' decision in the case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Lmited* [1943] AC 32, where Lord Wright stated the following at p 6:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

[67] The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 at p 484 held that a cause of action in unjust enrichment can give rise to a right to restitution when it can be established that:

(a) the defendant must have been enriched;

(b) the enrichment must be gained at the plaintiff's expense;

(c) that the retention of the benefit by the defendant was unjust; and

(d) there must be no defence available to extinguish or reduce the defendant's liability to make restitution.

[68] In this case, it is a claim by the plaintiff that the second defendant has been unjustly enriched by the fact that a substantial sum of money from the sum of USD253,000 which they had paid the first defendant for the purchase of the oils was transferred into an account of a company known as Cotruzione Machine Automatic Varie Resources, a company registered under the second defendant's name.

[69] From the statement of account of Contruzione which the plaintiff has recovered through the discovery procedure, it can be seen that a sum of RM539,303 was transferred from the first defendant's Maybank Account No 505104027258 to the company's bank account.

[70] In fact, in para 21 of his defence the second defendant admitted that there were several sums of money deposited into the business bank account of Cotruzione Machine Automatic Varie Resources owned by him, from the bank account of the first defendant.

[71] This amounts to a judicial admission which stands on a higher footing that evidentiary admission. In support, the plaintiff refers to the decision of the Federal Court in *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478:

> [16] The above averment was in response to para 12 of the statement of claim wherein the appellants averred that the company and the respondent had confirmed

in writing of the amount owing and payable to them. It is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission (*Sarkar's Law of Evidence*) with the respondent's admission therein be made the foundation of the rights of the parties (*Satish Mohan Bilal v State of UP* AIR 1986 ALL 126, at p 128; 1985 All CJ 507. Any failure on the part of the respondents to rebut the admission to avoid the legal consequences of his admission would entitle the appellants to enter judgment against him.

[72] Thus, the plaintiff argues that it is beyond doubt that the second defendant had been enriched by the payment made by the plaintiff to the first defendant. This is simply because a substantial sum of RM539,303 from the plaintiff's full payment of USD253,000 to the first defendant was transferred to the second defendant's company's account for no apparent reasons.

[73] In his defence, the second defendant maintained that the transfer of the said RM539,303 into his company's business account by the first defendant was made on the instruction of his friend named Maradona. The second defendant claims that:

(a) Maradona is a business partner of the first defendant;

(b) Maradona as a foreigner has problems opening bank accounts;

(c) the monies received from the first defendant into Cotruzione's business account are Maradona's monies; and

(d) the second defendant had dealt with the monies in Cotruzione account with the instructions of Maradona. One such instruction is for the second defendant to transfer the money to pay certain third parties.

[74] It is a trite law that a party who pleads a fact must prove it (s 103 of the Evidence Act 1950).

[75] However, having perused the evidence, the court finds that the second defendant has failed to discharge the said burden of proof.

[76] There is no evidence whatsoever of the existence of Maradona. The second defendant attempted to prove that Maradona is a genuine character by bringing a witness — DW2, his friend who works as a police officer and had claimed to have known Maradona.

[77] DW2 claimed to have spotted Maradona from far and had seen second defendant and Maradona in action, where the second defendant was transferring monies on Maradona's instructions.

[78] However, the court finds that DW2's evidence in regard to knowing this Maradona character is lacking in substance. His evidence on Maradona is both sketchy and unclear. He did not even know the full name of Maradona. From his evidence, he has never talked to Maradona but has only seen Maradona and second defendant engaged in discussions from far. There is no evidence that he was involved in any of the discussions.

[79] Furthermore, DW2 also admitted that he does not speak English. Thus, even if he had overheard the conversation between Maradona and the second defendant, there is every reason to believe that he would not have been able to understand it.

[80] Hence, his evidence that he saw the second defendant doing some money transfers on the instructions of Maradona is one that is both speculative and not based on any proof.

[81] The court also finds that the second defendant has failed to bring any evidence to support his allegation that the money which was deposited into his company's account was in fact, Maradona's money:

(a) there is no evidence which shows that Maradona is the first defendant's business partner;

(b) there is no evidence that Maradona is a foreigner having problems opening bank accounts;

(c) there is no evidence to show that the second defendant received monies in his Contruzione account on behalf of Maradona as claimed by him;

(d) there is no evidence that the second defendant had dealt with the monies received in his Cotruzione account in accordance with the instructions of Maradona; and

(e) if the monies in the Contruzione account were to be paid into third parties account on Maradona's instructions as claimed by the second defendant, then the second defendant had failed to provide the names of the transferees, the dates and the amounts transferred or, the account details of the transferees.

[82] It is the finding of the court that this Maradona character is just a figment of the second defendant's imagination. All the evidence that he brought to justify the payment of monies from the first defendant's account into his company's account were unsupported with any proof.

[83] Therefore, the court is of the view that second defendant has failed to bring any valid justification which explains the reason behind the transfer of the monies from the first defendant's account into his company's account.

[84] On the other hand, the plaintiff had produced evidence to show that the second defendant is Mr Rayan Zikri, the marketing and sales manager of the first defendant, As a representative of the first defendant, it is reasonable to believe that the second defendant had an access into the first defendant's Maybank account. The evidence has shown that monies were transferred from the account of the first defendant's into the business account of Contruzione, a company registered under the second defendant's name. In the absence of any legitimate explanation for the said transfer, it is the finding of this court that the monies paid into Contruzione's account is the plaintiff's monies.

[85] As mentioned above, it is also a fact that despite making a full payment for the goods, the plaintiff has not received the oils in the quality and quantity as promised. Therefore, it is the plaintiff's claim that in receiving the monies from the first defendant's account, the second defendant has been unjustly enriched.

[86] Under this suit, the plaintiff is claiming for restitution for unjust enrichment. In determining whether the enrichment is unjust, the question to ask to the enriched party is — 'Do you have basis to retain the benefit?'. If there is an absence of basis, then the enrichment is unjust.

[87] The court is also bound by the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 at p 484 which decides that a cause of act ion in unjust enrichment can give rise to a right to restitution when it can be established that:

(a) the defendant must have been enriched;

(b) dhe enrichment must be gained at the plaintiff's expense;

(c) dhat the retention of the benefit by the defendant was unjust; and

(d) dhere must be no defence available to extinguish or reduce the defendant's liability to make restitution.

[88] Based on the above facts, the court is of the view that the plaintiff, has managed to show that the second defendant has no basis whatsoever to retain the monies in the Cotruzione's account.

[89] The plaintiff has succeeded in proving that despite having received full payment for the purchase of the oils, the defendants failed to deliver the said goods to the plaintiff.

[90] Thus, there is no basis for the second defendant to keep or retain the plaintiff's money. By keeping the money for their benefit, the second defendant is unjustly enriched at the plaintiff's expense, and this has given rise to the right by the plaintiff to claim for restitution against the second defendant.

[91] In conclusion, based on the abovementioned reasons, the court finds that, on the balance of probabilities, the plaintiff has succeeded in proving its case against the second defendant. The court also finds that the second defendant has failed to discharge his evidential burden to bring any evidence to deny or rebut the plaintiffs case against him.

[92] On that note, the court hereby decides that the plaintiff's claim against the second defendant is allowed with costs.

Plaintiff's claim against second defendant allowed with costs of RM25,000 to be paid by second defendant to plaintiff.

Reported by Dzulqarnain Ab Fatar